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No. 97826-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DANIEL LYON,

Plaintiff/Appellant,

v.

OKANOGAN COUNTY ELECTRIC COOPERATIVE, Inc. a
Washington corporation; and PUBLIC UTILITY DISTRICT NO. 1 OF
DOUGLAS COUNTY, a public utility district,

Defendants/Respondents.

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

Daniel E. Huntington
WSBA No. 8277
422 W. Riverside, Ste. 1300
Spokane, WA 99201
(509) 455-4201

Valerie D. McOmie
WSBA No. 33240
4549 NW Aspen St.
Camas, WA 98607
(360) 852-3332

On behalf of
Washington State Association for Justice
Foundation

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice. WSAJ Foundation operates an amicus curiae program and has an interest in the rights of persons seeking redress under the civil justice system, including an interest in a firefighter's right to obtain full compensation for injuries suffered in the course of fighting fires.

II. INTRODUCTION AND STATEMENT OF THE CASE

This case concerns a firefighter's right to seek compensation from a tortfeasor whose tortious conduct caused a fire that injured the firefighter. This appeal provides the Court with an opportunity to reconsider the court-made "professional rescuer doctrine," and whether that rule should continue to bar professional rescuers from recovering damages from the entities responsible for tortiously creating the hazard that required the rescuers' response. The facts are drawn from the briefing of the parties. *See* App. Br. at 3-7; Resp. Okanogan County Electric Coop. Br. at 4-8; Resp. PUD No. 1 Br. at 3-5.

For purposes of this brief, the following facts are relevant. Daniel Lyon was employed as a firefighter for the United States Forest Service. On August 19, 2015, Lyon was dispatched as part of a four-person crew to perform structure-protection operations at the Twisp River fire. While

Lyon's crew was fighting that fire, a sudden change in wind direction and magnitude resulted in the crew's forced evacuation. In the course of that evacuation, the fire overtook the crew's engine. Three crewmembers died in the fire, and Lyon suffered severe burns over 70% of his body.

Lyon filed suit against Okanogan County Electric Cooperative (OCEC) and Public Utility District No. 1 of Douglas County (PUD), alleging that OCEC owned, operated and maintained high-voltage distribution lines over property owned by the PUD. Lyon alleged that the defendants' failure to adequately maintain vegetation adjacent to the high-voltage powerlines resulted in the ignition of the vegetation, caused a fire that burned in excess of 11,000 acres, and resulted in three deaths and Lyon's severe injuries. Lyon alleged causes of action against the defendants for negligence, gross negligence, recklessness and willful and wanton conduct.

OCEC and the PUD moved for summary judgment. The trial court granted summary judgment and entered an order dismissing all of Lyon's claims, finding the claims were barred under the professional rescuers doctrine. Lyon appealed to Division III of the Court of Appeals, and the case was subsequently certified and transferred to this Court.

III. ISSUE PRESENTED

Whether the Washington Supreme Court should abandon the Court-made professional rescuer doctrine.

IV. SUMMARY OF ARGUMENT

In 1975, this Court adopted the “professional rescuer doctrine,” which acted as a complete bar to a rescuer’s cause of action against a party that caused the danger that required rescue, based upon the assumption of risk doctrine. See *Maltman v. Sauer*, 84 Wn.2d 975, 977-79, 530 P.2d 254 (1975). In the decades following the decision in *Maltman*, Washington jurisprudence regarding assumption of the risk has been further developed and refined. Continued recognition of the professional rescue doctrine as a complete bar to a rescuer’s cause of action against a tortfeasor that created the reason for rescue is inconsistent with the further development of assumption of risk law in Washington since 1975. Additionally, principles and public policies underlying the statutory schemes governing compensation for professional rescuers, including firefighters, support the recognition of third-party actions. The professional rescue doctrine should be reconsidered and abolished by this Court.

V. ARGUMENT

A. Overview Of Washington Law Regarding The Rescue Doctrine And The Professional Rescue Doctrine.

Washington has adopted the “rescue doctrine,” which “allows an injured rescuer to sue the party which caused the danger requiring the rescue in the first place.” *McCoy v. American Suzuki Motor Corp.*, 136 Wn.2d 350, 355, 961 P.2d 952 (1998). The rescue doctrine “negates the presumption that the rescuer assumed the risk of injury when he knowingly undertook

the dangerous rescue.” *McCoy*, 136 Wn.2d at 355. The rescue doctrine requires negligence on the part of the defendant that proximately causes the rescuer's injury, a reasonably prudent assessment of imminent peril, and reasonable care in effecting the rescue. *See French v. Chase*, 48 Wn.2d 825, 830, 297 P.2d 235 (1956). “The rescue doctrine encourages efforts to save imperiled persons despite a rescuer's voluntary (though not reckless) exposure to danger.” *Ballou v. Nelson*, 67 Wn. App. 67, 70, 834 P.2d 97 (1992). A professional rescuer (*e.g.*, a firefighter), “is within the intended scope of the rescue doctrine.” *Maltman*, 84 Wn.2d at 978. Washington cases discussing the rescue doctrine frequently cite Justice Cardozo’s opinion in *Wagner v. International Ry.*, 232 N.Y. 176, 133 N.E. 437 (1921). *See, e.g., McCoy*, 136 Wn.2d at 355; *Maltman*, 84 Wn.2d at 976-78; *French*, 40 Wn.2d at 829; *Ballou*, 67 Wn. App. at 70. Justice Cardozo described the rescue doctrine as follows: “The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer.” 133 N.E. at 437.

In *Maltman*, the Supreme Court adopted the “professional rescuer doctrine,” which provides an exception by denying the benefits of the rescue doctrine to professional rescuers who are paid to assume risks inherent in their work. *See Maltman*, 84 Wn.2d at 979. “[I]t is the business of professional rescuers to deal with certain hazards, and such an individual cannot complain of the negligence which created the actual necessity for exposure to those hazards.” *Id.* (brackets added). The Court described the professional rescuer as “assuming” certain hazards inherent in professional

rescue activity when the professional rescuer accepts his or her position and the salary that comes with the job. *See id.* at 978.

The professional rescuer doctrine does not apply when a hazard is “hidden, unknown, and extra hazardous,” when an independent or intervening act causes the rescuer’s injury, or when an intentional act causes the injury. *See Beaupre v. Pierce County*, 161 Wn.2d 568, 572-73, 166 P.3d 712 (2007) and cases cited therein.

B. This Court Should Reconsider And Abolish The Judicially Created Professional Rescuer Doctrine, Because It Is Inconsistent With The Assumption Of Risk Doctrine As Developed And Adopted In Washington.

In *Freehe v. Freehe*, 81 Wn.2d 183, 189, 500 P.2d 771 (1972), *overruled on other grounds by Brown v. Brown*, 100 Wn.2d 729, 675 P.2d 1207 (1984), the Court stated that the question of the abolition of a court-made rule based upon the common law is properly a matter for the Court's consideration. Where a doctrine has been created judicially, depends upon the common law for its origin, and has not been specifically enacted by the Legislature, the Court has the power to consider whether the doctrine continues to be viable and need not await legislative action to consider abolishing the rule. *See Freehe*, 81 Wn.2d at 189. “[W]e abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule.” *Id.* (quoting *Borst v. Borst*, 41 Wn.2d 642, 657, 251 P.2d 149 (1952)). *See also Wyman v. Wallace*, 94 Wn.2d 99, 101, 615 P.2d 452 (1980).

In *Maltman*, in adopting the professional rescuer doctrine, the Court relied upon: 1) cases from New Jersey and Oregon where the respective courts applied the doctrine; and 2) an analysis that the professional rescuer “assumes” certain hazards inherent in rescue activity. *See Maltman*, 84 Wn.2d at 978. In a later decision, the Court described its adoption of the professional rescuer doctrine in *Maltman* as based upon assumption of risk. *See Beaupre*, 161 Wn.2d at 576. The Court described the professional rescuer doctrine as “essentially a type of implied primary assumption of the risk.” *Id.*, 161 Wn.2d at 576; *see also Markoff v. Puget Sound Energy, Inc.*, ___ Wn. App. 2d ___, 447 P.3d 577, 582-83 (2019) (“The professional rescuer doctrine is based on a broad policy of assumption of risk.”)

New Jersey and Oregon have since abandoned the professional rescuer doctrine. New Jersey abolished the doctrine by statute. *See* N.J. Stat. Ann. § 2A:62A-21; *Ruiz v. Mero*, 189 N.J. 525, 537-38, 917 A.2d 239 (2007). Oregon abolished the doctrine judicially, because it was based on implied primary assumption of risk which has been abolished in Oregon. *See Christensen v. Murphy*, 296 Ore. 610, 619-21, 678 P.2d 1210 (1984).¹ As Lyon accurately points out, several other jurisdictions have similarly

¹ The Oregon Supreme Court abolished the “fireman’s rule” primarily because its “major theoretical underpinning,” *i.e.*, the implied primary assumption of risk, was gone. However, the Court also examined “if any other supportable theory under the general rubric of ‘policy’ will provide the foundation for the rule.” 296 Or. at 619-20. The Court considered the most frequently cited policies in support of the rule: 1) to avoid burdening premises owners; 2) to spread the risk of firefighters injuries to the public through worker’s compensation, salary and fringe benefits; 3) to encourage the public to call for professional help in emergency situations; 4) to avoid increased litigation. *Id.* at 619. The Court found all of these policies flawed and abolished the “fireman’s rule.” *Id.* at 619-21.

dispensed with the doctrine. *See* App. Op. Br. at 8-17; Reply Br. at 307 (citing cases).

Subsequent to the adoption of the professional rescuer doctrine in *Maltman*, Washington jurisprudence has further examined and developed the law concerning assumption of risk. *See Shorter v. Drury*, 103 Wn.2d 645, 695 P.2d 116, *cert. denied*, 474 U.S. 827 (1985); *Kirk v. WSU*, 109 Wn.2d 448, 746 P.2d 285 (1987); *Scott v. Pac. W. Mtn. Resort*, 119 Wn.2d 484, 834 P.2d 6 (1992); *Tincani v. Inland Empire Zoological Society*, 124 Wn.2d 121, 875 P.2d 621 (1994). These Supreme Court cases cite and rely extensively upon the Prosser and Keeton framework which divides assumption of risk into four classifications: (1) express; (2) implied primary; (3) implied reasonable; and (4) implied unreasonable. *See Shorter*, 103 Wn.2d at 655-56; *Kirk*, 109 Wn.2d at 452-54; *Scott*, 119 Wn.2d at 496-98, nn.20, 23, 24, 26, 28, 31; *Tincani*, 124 Wn.2d at 143 (citing W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on Torts*, § 68 (5th ed., 1984)) (“Prosser & Keeton”). Continuing application of the professional rescuer doctrine as a total bar to a cause of action is inconsistent with this subsequent development of assumption of risk analysis in Washington since *Maltman*.

“Express assumption occurs when parties agree in advance that one of them is under no obligation to use reasonable care for the benefit of the other and will not be liable for what would otherwise be negligence.” *Scott*, 119 Wn.2d at 496 (citing Prosser & Keeton at 482-84). “Where express

assumption of risk occurs, the plaintiff's consent is manifested by an affirmatively demonstrated, and presumably bargained upon, express agreement." *Kirk*, 109 Wn.2d at 453.

"Implied *primary* assumption of risk arises where a plaintiff has impliedly consented (often in advance of any negligence by defendant) to relieve defendant of a duty to plaintiff regarding specific *known* and appreciated risks." *Scott*, 119 Wn.2d at 497 (citing Prosser & Keeton at 496). Express and implied primary assumption of risk act as a complete bar to recovery. *See Scott*, 119 Wn.2d at 496 (citing Prosser & Keeton at 482-84), 498 (citing Prosser & Keeton at 496).

"[I]mplied reasonable and unreasonable assumption of risk arise where the plaintiff is aware of the risk that already has been created by the negligence of the defendant yet chooses voluntarily to encounter it." *Scott*, 119 Wn.2d at 499 (quoting *Leyendecker v. Cousins*, 53 Wn. App. 769, 774, 770 P.2d 675, *review denied*, 113 Wn.2d 1018 (1989) (brackets added)). Implied reasonable and unreasonable assumption of risk operate as a damage-reducing factor rather than a complete bar to recovery. *See Scott*, 119 Wn.2d at 497 (recognizing that "the last two types of assumption of risk (which involve the plaintiff's voluntary choice to encounter a risk created by the defendant's negligence) retain no independent significance from contributory negligence after the adoption of comparative negligence").

In *Lyon*, the plaintiff was a professional firefighter injured in the course of responding to a fire allegedly caused by the negligence of the

defendants. Express assumption of risk clearly does not apply to these facts; there was no agreement between Lyon and the defendants. The question is whether Lyon's firefighting activities constitute implied primary assumption of risk, as opposed to implied reasonable or unreasonable assumption of the risk.

Prosser & Keeton describe implied primary assumption of risk as similar to express assumption, but without "the additional ceremonial and evidentiary weight of an express agreement." *Kirk*, 109 Wn.2d at 453 (quoting Prosser & Keeton at 496.) "[A]ssumption of risk in this form is really a principle of no duty, or no negligence, and so denies the existence of any underlying cause of action." Prosser & Keeton, at 496; *see also Scott*, 119 Wn.2d at 498 (citing Prosser & Keeton at 496). Implied primary assumption of risk requires three elements: the plaintiff must know the risk is present, the plaintiff must understand the nature of the risk, and the plaintiff's choice to incur the risk must be free and voluntary. *See Kirk*, 109 Wn.2d at 453 (citing Prosser & Keeton at 486-87). In discussing the required "voluntary" element, the authors state:

In general, the plaintiff is not required to surrender a valuable right, such as the use of his own property as he sees fit, merely because the defendant's conduct has threatened him with harm if the right is exercised...By placing him in the dilemma, the defendant has deprived him of his freedom of choice, and so cannot be heard to say that he has voluntarily assumed the risk. *Those who dash in to save their own property, or the lives or property of others, from a peril created by the defendant's negligence, do not assume the risk where the alternative is to allow the threatened harm to occur....* [O]f course, the danger may be out of all proportion to the value of any benefits involved, and so the plaintiff may be charged with

contributory negligence for unreasonably choosing to confront the risk.

Prosser & Keeton at 491 (emphasis and brackets added).

Washington has incorporated Prosser & Keeton's assumption of risk classifications into its common law. *See Scott*, 119 Wn.2d at 496-99; *Tincani*, 124 Wn.2d at 143. WPI 13.03 defines implied primary assumption of risk, and follows the Prosser & Keeton analysis in including the following language in the jury instruction:

It is a defense to an action for personal injury that the person injured impliedly assumed a specific risk of harm.

A person impliedly assumes a risk of harm if that person knows of the specific risk associated with an activity, understands its nature, voluntarily chooses to accept the risk by engaging in that activity, and impliedly consents to relieve the defendant of a duty of care owed to the person in relation to the specific risk.

A person's acceptance of a risk is not voluntary if that person is left with no reasonable alternative course of conduct to avoid the harm or to exercise or protect a right or privilege because of the defendant's negligence.

6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 13.03 (7th ed.) (July 2019 update).

In agreeing to employment as a firefighter, a person may assume the dangers inherent in and necessary to fighting fires. However, a firefighter does not “impliedly consent[] to relieve the defendant of a duty of care owed to the person in relation to the specific risk,” where the defendant negligently causes the fire that results in injuries to the firefighter. The firefighter’s acceptance of the risk in fighting a fire “is not voluntary” because the firefighter “is left with no reasonable alternative course of

conduct to avoid harm or to exercise or protect a right or privilege because of the defendant's negligence." Agreeing to employment as a firefighter does not come within the definition of implied primary assumption of the risk.

The Comment to WPI 13.03 states that the above-quoted last paragraph of the instruction was added "to meet the requirements" of *Tincani*, 124 Wn.2d 121. In *Tincani*, the Court stated that a jury verdict indicated that the jury concluded

[The plaintiff] voluntarily chose to encounter a risk *created* by the [defendant's] negligence.... This type of assumption of risk is called "unreasonable assumption of the risk"... Unreasonable assumption of the risk retains no independent significance from contributory negligence after Washington's adoption of comparative negligence ... As we concluded in *Scott*, such assumption of the risk does *not bar all recovery*.

124 Wn.2d at 145 (citations omitted; brackets added).

In discussing "implied reasonable" assumption of risk, the authors in Keeton & Prosser state:

[W]here the defendant's negligence has forced the plaintiff into a situation where he must reasonably choose to undergo the risk, there seems to be a fundamental flaw in reasoning that the plaintiff should thereby be held to have forfeited any right to charge the defendant for his resulting injuries. It would thus appear quite odd if the plaintiff's reasonable assumption of the risk to which he was exposed by the negligence of the defendant were treated as an absolute bar.

Id. at 497 (brackets added).

This Court should reconsider the professional rescuer doctrine in light of the development of assumption of risk jurisprudence since the *Maltman* decision. The analysis supporting the adoption of the doctrine was

based upon assumption of risk. *See Maltman*, 84 Wn.2d at 978; *Beaupre*, 161 Wn.2d at 572, 576. In the decades following the *Maltman* decision, this Court has further examined and refined the assumption of risk doctrine, largely adopting the framework from Prosser & Keeton and its classification into express, implied primary, implied reasonable and implied unreasonable assumption of risk. *See Shorter*, 103 Wn.2d at 655-56; *Kirk*, 109 Wn.2d at 452-54; *Scott*, 119 Wn.2d at 496-98; *Tincani*, 124 Wn.2d at 143.

One of the required elements to establish implied primary assumption of the risk, which constitutes a complete bar to a tort action, is that the plaintiff *voluntarily* incurs a risk. *See Kirk*, 109 Wn.2d at 453; Prosser & Keeton at 486-87. Prosser & Keeton explain that a plaintiff does not voluntarily assume a risk when a defendant's conduct forces the plaintiff to confront a risk in order to protect a valuable right, providing the example of one who "dashes in" to protect the lives or property of others from a hazard created by the defendant's negligence. *See Prosser & Keeton* at 491. A firefighter battling a fire to protect others' property and lives does not come within the definition of implied primary assumption of risk set forth in Prosser & Keeton and adopted as the common law in Washington. *See WPI 13.03* ("A person's acceptance of a risk is not voluntary if that person is left with no reasonable alternative course of conduct... to exercise or protect a right or privilege because of the defendant's negligence.")

On the other hand, a firefighter's conduct in fighting a fire to protect others' lives or property may come within Prosser & Keeton's definition of

implied reasonable assumption of risk, which is not an absolute bar but may be a damage-reducing factor in a tort action, “where the defendant’s negligence has forced the plaintiff into a situation where he must reasonably choose to undergo the risk.” Prosser & Keeton at 497; *see also Tincani*, 124 Wn.2d at 145 (describing conduct where the plaintiff “voluntarily chose to encounter a risk created by the [defendant’s] negligence” as unreasonable assumption of the risk, which is not a complete bar to recovery but only a damage-reducing factor); *Scott*, 119 Wn.2d at 499 (stating that both implied reasonable and unreasonable assumption of risk “arise where the plaintiff is aware of the risk that already has been created by the negligence of the defendant yet chooses voluntarily to encounter it”).

The professional rescuer doctrine in effect provides an immunity against suit in favor of the negligent tortfeasor who causes a fire that injures a firefighter. Immunity leaves the injured firefighter with an inadequate remedy, which “runs contrary to the most fundamental precepts of our legal system.” *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 105, 829 P.2d 746 (1992) (discussing quasi-judicial immunity). Under Washington’s assumption of risk law as it has developed since the adoption of the professional rescuer doctrine, firefighting activity in protecting others’ lives or property may, in some circumstances, constitute implied reasonable or unreasonable assumption of risk, which are forms of comparative negligence. Such activity does not meet the criteria for implied primary assumption of the risk, which is a complete bar to recovery. The

professional rescuer doctrine, as a complete bar to recovery, should be abandoned.

C. This Court's Principles Supporting Third-Party Actions In Workers Compensation Cases Offer Guidance In Determining Whether To Abolish The Professional Rescuers Doctrine.

The parties' briefing states that Daniel Lyon was an employee of the United States Forest Service. Understandably, there is no discussion of Lyon's eligibility for any form of retirement or disability compensation, because those benefits are not at issue in this appeal. Since Lyon was a United States Forest Service employee, it is not assumed that he is eligible for Washington state workers compensation benefits under Title 51, the Industrial Insurance Act (IIA) or the Law Enforcement Officers' and Fire Fighters' Retirement System Act (LEOFF) benefits under chapter 41.26 RCW. Accordingly, law related to those benefits programs is not directly applicable here. However, the principles stated in Washington law in support of allowing third-party actions under Title 51 offer guidance for determining whether a firefighter should be permitted to pursue a lawsuit against a tortfeasor who caused a fire that injured the firefighter.

Under the IIA, injured workers may sue third-party tortfeasors. *See* RCW 51.24.030.² This Court has long held that the right to sue a third-party

² Firefighters are entitled to benefits in Washington under LEOFF. *See* RCW 41.26.020. LEOFF 2 members are eligible for IIA benefits. *See* RCW 41.26.480. (LEOFF 2 members include firefighters who became members after October 1, 1977. *See* RCW 41.26.05(23)). LEOFF grants firefighters the "right to sue" their employers for negligence. *See* RCW 41.26.281; *Beaupre*, 161 Wn.2d at 574; *Fray v. Spokane County*, 134 Wn.2d 637, 648-49, 952 P.2d 601 (1998). "[F]irefighters and police officers, because of the vital and dangerous nature of their work, are provided extra protection and are allowed to both collect workers' compensation and bring job related negligence suits against their employers." *Hauber v. Yakima County*, 147 Wn.2d 655, 660, 56 P.3d 559 (2002).


tortfeasor is a “valuable right to the workman.” *Entila v. Cook*, 187 Wn.2d 480, 489, 386 P.3d 1099 (2017) (quoting *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 599, 257 P.3d 532 (2011)). This Court has expressed a “strong policy” favoring third-party actions. *Entila*, 187 Wn.2d at 488. Allowing third-party actions “spreads responsibility for compensating injured employees and their beneficiaries to third parties who are legally and factually responsible for the injury.” *Flanigan v. Dep’t of Labor & Indus.*, 123 Wn.2d 418, 424, 869 P.2d 14 (1994).

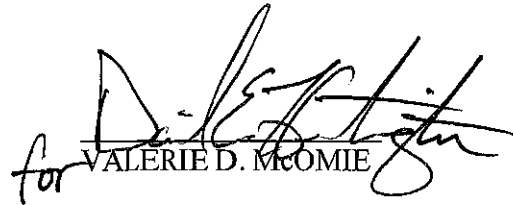
The right to sue the party that negligently ignited a fire that resulted in severe injuries to a firefighter is a valuable right. It seems anomalous to allow a firefighter to bring third-party claims against intervening tortfeasors and intentional tortfeasors, yet bar a claim against the tortfeasor whose conduct started the fire that injured the firefighter. The principles that support allowing injured workers to bring third-party actions favor abolition of the professional rescuers doctrine in order to allow firefighters to pursue a cause of action against an entity that ignited a fire that caused a firefighter’s injuries.

VI. CONCLUSION

The Court should adopt the arguments advanced in this brief in the course of resolving the issues on review.

DATED this 6th day of December, 2019.


DANIEL E. HUNTINGTON

for 
VALERIE D. McOMIE

On behalf of
Washington State Association for Justice
Foundation

CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury, under the laws of the State of Washington, that on the 6th day of December, 2019, I served the foregoing document by email to the following persons:

Counsel for Plaintiffs/Appellants:

Stephen L. Bulzomi
James W. McCormick
Evergreen Personal Injury Counsel
100 S. 9th St.
Tacoma, WA 98402
sbulzomi@epic-law.com
jmccormick@epic-law.com

Kenneth W. Masters
Shelby R. Frost Lemmel
Masters Law Group, P.L.L.C.
241 Madison Avenue North
Bainbridge Island, WA 98110
ken@appeal-law.com
shelby@appeal-law.com

Counsel for Defendant/Respondent Okanogan County Electric Cooperative, Inc.:

Daniel W. Short
Paine Hamblen, LLP
717 W. Sprague Ave., Suite 1200
Spokane, WA 99201
dan.short@painehamblen.com
julie.heath@painehamblen.com

Counsel for Defendant/Respondent Public Utility District No. 1 of Douglas County:

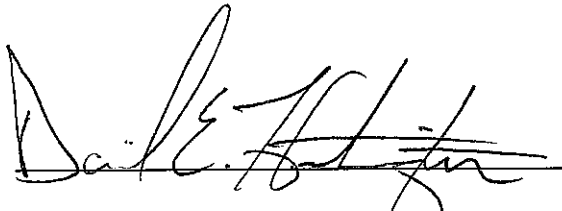
Aloysius G. Lingg
Scott A. Samuelson
901 5th Ave., Suite 1400
Seattle, WA 98164
glingg@foum.law
ssamuelson@foum.law

Counsel for Washington Department of Natural Resources:

Paul F. James
Washington State Attorney General
1125 Washington St. SE
Olympia, WA 98504
paulj@atg.wa.gov
resolyef@atg.wa.gov

Counsel for Washington Department of Fish & Wildlife

Michael J. Throgmorton
Jennifer D. Loynd
Washington State Attorney General
7141 Clearwater Dr. SWA
Olympia, WA 98504
michaelt3@atg.wa.gov
jenniferL1@atg.wa.gov

A handwritten signature in black ink, appearing to read "Daniel E. Huntington", with a long horizontal flourish extending to the right.

Daniel E. Huntington, WSBA # 8277
WSAJ Foundation

December 06, 2019 - 4:39 PM

Transmittal Information

Filed with Court: Supreme Court
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Appellate Court Case Title: Daniel Lyon v. Okanogan County Electric Cooperative, et al
Superior Court Case Number: 18-2-00235-6

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- dan.short@paineamblen.com
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- jbranaman@foum.law
- jmccormick@epic-law.com
- julie.heath@paineamblen.com
- ken@appeal-law.com
- king@carneylaw.com
- michael3@atg.wa.gov
- paralegal@appeal-law.com
- paulj@atg.wa.gov
- sbulzomi@epic-law.com
- shelby@appeal-law.com
- ssamuelson@foum.law

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Address:

4549 NW ASPEN ST
CAMAS, WA, 98607-8302
Phone: 360-852-3332

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